

Letters to the Journal

In the Spring 2005 issue of the Ohio State Journal of Criminal Law, Professor George Thomas reviewed Gary L. Stuart's book, Miranda: The Story of America's Right to Remain Silent, published by the University of Arizona Press in 2004. Entitled, "Missing Miranda's Story," Professor Thomas' review began with the sentence, "This is a very disappointing book." 2 Ohio St. J. Crim. L. 677 (2005).

What follows is a letter from Mr. Stuart, in response to the Thomas review, followed by a brief reply by Professor Thomas. As we have indicated before, we welcome letters to the Journal from readers on any topic covered in a prior issue.

Dear Journal:

Thank you for the opportunity to respond to Professor Thomas. It is an honor to be invited to post something in your prestigious review, even if under these uncomfortable circumstances. I have written four books, a great many articles, several reviews, a few op-ed pieces, and more trial court motions and appellate briefs than I care to count. My written work has been reviewed by judges, editors, professional reviewers, and critics of many stripes. Sadly, at least for me, this is the first time anyone in either academe or law has chastised me personally under cover of academic ventose.

Most of us lead essentially unexamined lives, free from personal attack, and oblivious to the kind of academic invective Professor Thomas so liberally sprinkles throughout his review. On reading his first paragraph, I was tempted to put the whole thing down, dismiss him and apply the age-old rubric of "he has his opinion and I have mine." But, given that I am first a trial lawyer¹ and only secondarily a law professor,² I could not resist reading on. On my second reading of his hit-piece, I was again tempted to let his diatribe go by, following the advice of James Stewart's character in *Harvey* who famously said, "In this world you have to be oh-so-smart or oh-so-pleasant. For years I was smart. I recommend pleasant."

Given his academic pedigree, no one can doubt that Professor Thomas is smart. But in publishing his review of me, I rather doubt that anyone I know would characterize him as pleasant. That is a painful admission because I know a

¹ I practiced law in one of Arizona's largest firms for thirty years, chaired its Litigation Department and served for some time as the firm's Vice-Chairman. During that time, I tried well over one hundred jury trials with some of the Southwest's best lawyers. I can't remember one of them speaking to me in the kind of dismissive, condescending terms used by Professor Thomas.

² While never aspiring to tenure, I have served as adjunct faculty in several ranked law schools and was honored with a distinguished faculty award from the National Institute of Trial Advocacy. My teaching credentials seem to be intact, notwithstanding Professor Thomas' low opinion of my research skills.

great many scholars who are both.³ I studied some of his work *before* I published my work and even quoted him in my book (at pages 103–04). As far as I know, I’ve done Professor Thomas no harm and yet he fairly seethes with a hissing fury at the notion that I would even dare to publish in an area where he seems to think he has preeminence.

By his own admission, Professor Thomas has published eight book reviews,⁴ which he describes as either positive or mixed. My years of reading literary criticism and law review articles about books give little solace in this particular situation, but they nevertheless reinforce the notion that most critics exercise restraint and disdain personal attacks. Nonetheless, I will do my best to remember that famous scene in *Casablanca* where Peter Lorre says to Humphrey Bogart: “You despise me, don’t you?” and Bogart replies: “I would if I bothered to think about you.”

In the realm of normal law professor behavior (whatever that may be), it is impossible to be completely oblivious to one’s critics. Indeed, it is unwise to do so. And that is why I carefully gave his review a third read. This reading taught me something important about my critic. I learned that I did not write *his* book, in *his* way, from *his* political perspective, or in a style that *he* prefers. I inferred from his personal remarks, and from his other published works, that he could not have ever written *my* book. And I discovered something sad in his words, even the unkind ones that slur the world of practicing lawyers. Unlike Professor Thomas, I live in both the academic and the practical worlds, trying complex cases in court and teaching in two fine law schools. It is the world of law *practice* that I can now see, thanks to Professor Thomas, that there is redemption in forgiving the gratuitous insult, in looking away from the rude comment, and in sentencing one’s critics to life without parole instead of an execution. He may be obsessed with my perceived incompetence, but I can extend my otherwise quite enjoyable life by really not caring what he thinks.

I called my book a “story” simply because I did not want to write in the professorial style that can fairly characterize the books that Professor Thomas has

³ As the current President of the Arizona Board of Regents, I have regular contact with a goodly number of the thousands of ranked faculty in Arizona’s three public universities. Some of my closest colleagues are Regents Professors and some hold endowed chairs at Arizona’s two public law schools. Several have expressed their views of my book. So far as I know, none thought me sloppy, disorganized or unskilled in either literature or law. In fact, I am also on a few Creative Writing faculties and hope that none of my colleagues in that world has occasion to read Professor Thomas’ review. But if they do, I imagine they would ask, “What did you ever do to him?”

⁴ Professor Thomas has also published (as co-editor with Richard A. Leo) a good piece of work entitled *THE MIRANDA DEBATE—LAW, JUSTICE AND POLICING* (1998). It is a collection of essays which I found very useful in my early research on *Miranda*. In retrospect, perhaps I should have praised it more than I did. It really is well done. Professor Thomas is also the author of some insightful law review articles. I suppose I could only wish he had more experience in book-length pieces because he might have been slightly more charitable given the rigors of the editing process in non-fiction books. My original 600-page manuscript was sliced and diced by two fine editors in a deliberate effort to make the book more of a “story” and less of a legal tome.

favorably reviewed. My two published “law books” were written for lawyers and law students. They are a decade old now and still used. No one remembers my law review articles, which is just as well. When I decided to move from professional legal writing to creative writing, I wrote my first novel, which is now in its second printing. It was written for those interested in a mix of politics, depression-era labor unions, great lawyering, a capital murder trial, and justice against all odds. The reviews of *The Gallup 14*, including one in *Publisher's Weekly*, were very positive. That success led me to think that I could write a book that other lawyers might enjoy—a non-professorial, *creative* approach to *Miranda*. Or so I thought until I dared to tackle Professor Thomas' domain.

My story of America's right to remain silent is intended for a very different, non-law professor audience. It is not the one that Professor Thomas sees or perhaps even recognizes. This does not mean that all law schools or most law professors see my book in the same way that Professor Thomas does. I have been invited to lecture on *Miranda* at three law schools and one fine school of social justice. Of course, the book has only been out for six months. There may be more faculty invitations or more faculty burnings-at-the-stake in store for me. I have given readings from the book to other learned audiences, and in the perverse world of books, maybe Professor Thomas will even spike my sales. But, my book was always intended for the audience that continues to buy it and that seems to genuinely enjoy the narrative. My target audience is a readership interested in the regional aspects of the case and intrigued about the characters that began the *Miranda* enterprise. Most important, I sought a readership untrained in the legal nuance that so profoundly impresses those teachers who are so profoundly impressed with legal nuance.

I don't mean to suggest that I wrote entirely for a lay audience or that I did not hope to earn the respect of a scholarly readership. I purposefully selected an academic publisher (against the advice of more than one New York literary agent). I selected the University of Arizona Press because it serves the academic community that I have been a part of for more than two decades. I know the drill. My manuscript was commissioned by the Director of the University of Arizona Press and subjected to a rigorous academic review process before it was finally accepted for publication. The legal scholarship, which Professor Thomas finds lacking, was found intact by ranked faculty in a Tier One public law school. The end product has been widely reviewed. Some reviews glow, some are merely praiseworthy, and one was cautious. Only one was intensely negative. It is this one by Professor Thomas, which literally begs this response. Put another way, Professor Thomas asked for it.

Professor Thomas structured his academic indictment of me in three separate but overlapping counts: I. Sloppiness About Law and History, II. Where's The Beef (the Story)?, and III. The Untold Story. Lest I be accused of his style of disparagement, I won't even try to deal with his opinions and will limit my response to the brickbats embedded in his indictment. At the outset, I should say that in my world (law, academe and politics) one's opinions are neither right nor

wrong, much less “flatly wrong.” Professor Thomas’ opinions belong to him, as do mine to me. He is quite free to believe in his and is welcome to comment on mine. I respect his opinions and won’t stoop to labeling any of them “flatly wrong.”

In Count I of his indictment, Professor Thomas says that I “got the history wrong.” For example, he recasts what I said in the book about Thomas Jefferson and offers his opinion that what I heard in Thomas Jefferson’s voice adds nothing to my book. Indeed, Professor Thomas says that my “Jefferson flourish” adds nothing to my argument. He goes on to say that it “is merely a confusing, gratuitous claim, one that opens him to the attack⁵ I just made and leaves the reader unsure whether to believe anything in the book.” Wow. One little flourish (right or wrong) allows my readers to disbelieve everything in my book? Talk about literary license. At the risk of repetition, Professor Thomas is entitled to his opinion. I’m entitled to mine. Mr. Jefferson had this to say on the subject of opinions: “An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates”

As to my “sloppiness,” he complains mightily about what he believes to be a slight towards the real scholar in this field, Professor Yale Kamisar, holder of the Clarence Darrow Distinguished Professorship at the University of Michigan School of Law. Ironically, my first cite to Professor Kamisar occurs on the same page of my book⁶ where I first cited Professor Thomas. To add to the irony, I cite *both* Professor Kamisar’s book *and* the one that Professor Thomas co-edited. I read and cited four of Professor Kamisar’s many published works in this field. But, I neither read nor cited the one which so “troubles” Professor Thomas. As to Professor Thomas’ innuendo of plagiarism, that charge might be best left to Professor Kamisar, not Professor Thomas. After all, Professor Kamisar read my entire manuscript before it was published and gave me the enormous gift of an exquisitely detailed, four-page, single-spaced letter offering sage advice and thanking me for writing what he said was, “[a] fast moving, illuminating and interesting account of how America’s most famous criminal procedure case came about and what happened to it in the four decades since it was decided.”

⁵ Why would a respected law professor ever want to “attack” me or any other lawyer or colleague? While I may lack academic tenure, I spent twenty-three years on the Arizona Supreme Court’s Committee on Rules of Professional Responsibility. I chaired that committee for ten years and wrote scores of ethical opinions, two books on ethics, and dozens of monographs on ethical issues. I also spent thirty years serving as counsel, hearing officer and probable cause panelist on hundreds of disciplinary cases. I can honestly say that nearly all of my colleagues in both legal practice and legal education made every attempt to follow the admonition in our rules “to abstain from all offensive personality.” See Arizona Supreme Court Rule 41(g).

⁶ Professor Kamisar is cited on pages 103, 147 and 148. He is, in my opinion, the leading scholar in the field and was cited many more times in the original manuscript. Alas, this is a book, not a law review article. It was cut down dramatically by the editorial staff for good and sufficient reasons.

Professor Thomas hints at plagiarism because Professor Kamisar used a metaphor in 1964 that is similar to one I used in my book. Professor Kamisar specifically commented on that similar but different metaphor in his letter to me of June 1, 2004. With his permission, I will quote from his letter to me of June 1, 2004.

At pp. 310–12 of your manuscript you call attention to the vast difference—so far as the rights of suspects and defendants are concerned—“between the gatehouse (the often-drab interrogation room in the local police station) and the courthouse.” You go on to say (pp. 311–12):

[Before the Warren Court revolution in American criminal procedure], the vast majority of suspects checked their information bags at the gatehouse. . . . After [the Warren Court revolution], America engaged in great debate over how to reconcile what apparently went on in the gatehouse with what obviously happened in the courthouse. . . .

. . . The gatehouse was more often a place where rights were ignored, suspects [did] not have lawyers, and no one was impartial. . . .

Why the Constitution was so important in the courthouse but largely ignored in the gatehouse became the dilemma faced by the Supreme Court in the *Miranda* case. . . .

I couldn't agree with you more. Indeed your observations have a familiar ring to them. A year *before* the *Miranda* case, at a time when you were still a law student at the University of Arizona, I made similar observations in an article you seem to be unaware of, an article I called: *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*. The essential part of that article is reprinted in the criminal procedure casebook I co-authored. (On the chance you might be interested in reading it, I am enclosing a copy of that reprinted part.)

In that article, written on the eve of *Miranda*, I observed:

The courtroom is a splendid place . . . But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? . . . Typically, he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.

In this “gatehouse” of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized “subject” and subjected to “interrogation tactics and techniques most appropriate for the occasion;” he is “game” to be stalked and cornered. Here, ideals are checked at the door, “realities” faced, and the prestige of law enforcement vindicated. . . .

True, the man on the street would have considerable difficulty in explaining why the Constitution requires so much in the courtroom and means so little in the police station, but that is not his affair. “The task of keeping the two shows going at the same time without losing the patronage or the support of the Constitution for either,” as Thurman Arnold once observed, is “left for the legal scholar.”

My “gatehouses and mansions” essay is easy to miss because it did not appear in a law review and thus cannot be found in any of the indexes to law reviews. It appeared instead in a monograph called *Criminal Justice in our Time*, a volume marking the 750th anniversary of [the] Magna Carta.

Professor Kamisar was kind enough to send me a copy of his essay. He is widely acknowledged as America’s leading scholar in the field. I can only wish that I had his insight, his eloquence, and his breadth of understanding. I wish that I had read his essay. Had I done so, I would have cited it and quoted extensively from it. I am sorry that I did not read it, did not quote from it, and did not cite to it. I am happy to take this occasion to publicly apologize to him for my sins of omission.

In the second count of his indictment, Professor Thomas moves the angle of his attack to the right flank and tiptoes into the field of creative prose by asking a cute rhetorical question: “Where’s The Beef (Story)?” He continues his metaphor by labeling my story as a “mushy stew.” Whether or not there is a story (either with beef or as a vegetarian entrée) is not for me to say. But others, perhaps less salty and without straining like Professor Thomas, have found the story in my book.

The American Library Association’s widely acknowledged *Booklist* reviewed the book on September 15, 2004 and called it “[i]nteresting, timely and important.” To Professor Thomas’ specific point about the lack of story, the reviewer said, “[t]he author, an attorney and law professor, who knew many of the people involved in the *Miranda* case and its aftermath, tells the *story* simply, making even the most complicated and subtle legal points entirely clear.”

Observations about creative writing and whether or not there is a “story” are almost always artistic choices that authors (and reviewers) must make as a matter

of trade craft. That is why the University of Arizona Press sought the opinions of masters of the craft before the book was released. In that vein, Professor Ron Carlson, Regents Professor of English at Arizona State University, carefully read the manuscript. Professor Carlson is one of America's foremost authors and the winner of numerous prizes and awards for both his fiction and his non-fiction. He is also one of my teachers. He said, following his review of my book, "Gary Stuart has written a stirring, vivid history of a watershed moment in American justice—a data-rich account that reads at times like a novel. . . . This may be the most important book published by a university press this year. It is magnificent work."

Professor Lattie Coor, President Emeritus and Professor of Public Affairs at Arizona State University called my book, "[a] fascinating and highly readable account of the events and issues surrounding the Supreme Court's decision in *Miranda*, Stuart . . . offer[s] a rich and rewarding understanding, for layman and lawyer alike, as to how *Miranda* became a household word in the American criminal justice system."

Professor Thomas was scornful of my interviews with police officers on legal issues. As he put it in his review, "Why would you ask police detectives a question about constitutional law?" I expect him to be equally scornful of my citing non-lawyers (like Professors Carlson and Coor) in response to his accusation that there is neither beef nor story in my book. However, my manuscript was reviewed by several very fine lawyers *before* publication. I won't bother to cite them all⁷ but will mention a former Chief Justice of the Arizona Supreme Court, a past President of the American Bar Association, and the current President of the American Judicature Society. Chief Justice Feldman said, "[t]his very readable book should be in the library of every American who wants to understand the real story and importance of the familiar incantation, 'You have the right to remain silent.'"

Former ABA President Roberta Cooper Ramo said, "Gary Stuart thoughtfully explains how the *Miranda* case became a signature of American democracy. . . . He brings to life those committed lawyers who fought for these principles over decades and lays the groundwork for the coming battle on the Constitution during times of war."

The President of the American Judicature Society, Larry Hammond, said: "Every law student and every person who believes in the importance of public respect for the administration of criminal justice will profit from Gary Stuart's

⁷ There are of course many more reviews of my book. I enjoyed the many kind letters sent to me by prominent and respected members of academe and law. Rather than unduly lengthen this response, I will not cite any other reviewers. But I cannot pass up the opportunity to report that my book was just named a *Spur Award Finalist*. I will be honored, along with my publisher, in the category of contemporary nonfiction for 2005 at the Western Writers of America convention on June 17, 2005.

impressive book. *Miranda* has withstood the test of time. This book will do the same.”

In his final assault on my book (“Part III, The Untold Story”) Professor Thomas offers his version of what he thinks I should have said. He quotes Senator John McCellan of Arkansas in an effort to help my readers, or perhaps his readers, see the difficulty “for us today to appreciate the law and order mentality of the late 1960s.” Once again, the artistic choices of who to cite and how to angle your opinions always belong to the author of a book. Professor Thomas cites Senator John McCellan of *Arkansas*. I will cite Senator John McCain of *Arizona*: “In the wake of 9/11, and with the ongoing debate about the rights of suspected terrorists, the timeliness of this book cannot be overstated. Gary Stuart’s *Miranda* should be required reading for all law students, practicing attorneys, and anyone involved in the shaping of American public policy.”

Professor Thomas closes his review with a very telling and quite personal opinion. He says, “[o]n my account, *Miranda* is hardly the ‘historic’ victory that Stuart wants it to be.” Actually, I think Professor Thomas got both points right and finally makes sense. By *his* account, as described in writings, *Miranda* is not historic (a unique position in legal circles), while I indeed want *Miranda* to be seen as historic (a common position in legal circles).

Of course, it is not for either of us to label *Miranda* as *historic*, particularly in the context of exchanging views about my book. And, it is not for either of us to close the debate about *Miranda*’s legacy. Professor Thomas dissents to nearly everything I said in my book. Although certainly not of the same stature, he brings to mind the lawyer, judge, scholar and author that many Americans see as both historic and insightful. Supreme Court Justice Oliver Wendell Holmes, the “Great Dissenter,” remained crusty until his death in 1935. In famous constitutional opinions he authored in 1919 and 1925, he laid the groundwork for the protection of speech that is not a “clear and present danger.” Respectfully, Professor Thomas presents no clear or present danger to me. So, as his rant may not enhance his own reputation, it certainly will not harm mine.

I genuinely respect Professor Thomas’ views and his well-earned reputation for scholarship. His review presents no clear or present danger to *Miranda*’s place in history. Professor Thomas is free to dissent and free to disagree with me and the other lawyers quoted in this response. I wish he had not been quite so bombastic, but that too is his right in both the legal and the literary worlds. If he wants to be the Dorothy Parker⁸ of legal non-fiction books, so be it.

⁸ Dorothy Rothschild Parker, in her much admired role as critic, satirical poet, and short-story writer, is remembered as much for her flashing verbal exchanges and malicious wit as for the disenchanting stories and sketches in which she revealed her underlying pessimism. Perhaps Professor Thomas sees himself as a legitimate successor to those famous people who populated Ms. Parker’s celebrated *round* table at the Algonquin Hotel in the 1930s.

All of us choose what to write about, our angle of approach, and how to present our views. Some of us choose one genre or style over another. It's easy to see from Professor Thomas' critique that he and I differ not only stylistically but substantively as well. At the end of the day, I can only hope that someone reviewing this exchange of views might say of me, "Well, he gave as good as he got."

Gary L. Stuart

Professor Thomas replies:

I am sorry that Gary Stuart perceived my review as a personal attack on him. I did not intend it to be about him, his writing style, or his choice of what audience to write for. But whether my review comes across as a personal attack or a critique of the book is, ultimately, up to the reader. I attempted to be clear, in Part III, that I was not criticizing him for telling a different story than I would have told, but I wanted the reader to know that there *was* another story to tell. In Parts I and II, I tried to explain why I thought the book was a disappointing effort. The success or failure of that, too, is up to the audience.

George C. Thomas III

